Filed 4/26/16 P. v. Smedley CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY ERROL SMEDLEY, Defendant and Appellant.	H042345 (Santa Clara County Super. Ct. No. CC773030)

I. INTRODUCTION

In July 2008 defendant Timothy Errol Smedley pleaded no contest to more than 20 felony offenses, including buying or receiving a stolen motor vehicle (Pen. Code, § 496d;[1] count 21) and receiving stolen goods (§ 496, subd. (a); count 24), and admitted the prior conviction allegations. The trial court imposed a total term of 21 years 8 months in the state prison.

In March 2015 defendant filed a petition to resentence two of his felony convictions (count 21 and count 24) as misdemeanors pursuant to section 1170.18, subdivision (a). Section 1170.18 was enacted by Proposition 47, the Safe Neighborhoods and Schools Act. (Prop. 47, as approved by voters, Gen. Elec. (Nov. 4, 2014), eff. Nov. 5, 2014.) The trial court denied the petition on the ground that a felony conviction

[1] All statutory references hereafter are to the Penal Code unless otherwise indicated.

for buying or receiving a stolen motor vehicle in violation of section 496d[2] (count 21) is ineligible for resentencing under section 1170.18. The court also found that section 1170.18 did not apply to count 24 since that was a felony conviction for receiving stolen goods (§ 496, subd. (a)) in excess of $950.

On appeal, defendant contends that the trial court erred because section 1170.18 should be construed to make a felony conviction for violating section 496d eligible for resentencing where the value of the stolen motor vehicle was $950 or less. Defendant also contends the trial court's order denying resentencing of his section 496d conviction violates his constitutional right to equal protection. For the reasons stated below, we find no merit in defendant's contentions and therefore we will affirm the order.

II. FACTUAL AND PROCEDURAL BACKGROUND

On July 30, 2008, defendant pleaded no contest to more than 20 felony offenses, including buying or receiving a stolen motor vehicle, a Hauli trailer (§ 496d; count 21) and receiving stolen goods (§ 496, subd. (a); count 24), and admitted the prior conviction allegations. The trial court imposed a total term of 21 years 8 months in the state prison. The record on appeal does not contain any information regarding the value of the stolen Hauli trailer.

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[2] At the time of defendant's 2007 offenses, former section 496d, subdivision (a) provided: "Every person who buys or receives any motor vehicle, as defined in Section 415 of the Vehicle Code, any trailer, as defined in Section 630 of the Vehicle Code, any special construction equipment, as defined in Section 565 of the Vehicle Code, or any vessel, as defined in Section 21 of the Harbors and Navigation Code, that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any motor vehicle, trailer, special construction equipment, or vessel from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in the state prison for 16 months or two or three years or a fine of not more than ten thousand dollars ($10,000), or both, or by imprisonment in a county jail not to exceed one year or a fine of not more than one thousand dollars ($1,000), or both."

On March 23, 2015, defendant filed a petition to resentence two of his felony convictions, count 21 and count 24, pursuant to section 1170.18, subdivision (a). During the hearing on the petition held on April 27, 2015, the court stated that "[defendant] has petitioned for relief under Proposition 47 in two counts. One, although it indicates a [section] 10851 of the Vehicle Code on the petition, in fact Count 21 is a violation of Penal Code Section 496[d], possession of a stolen automobile, which is not an eligible offense. Count 24 is a violation of Penal Code Section 496(a) which of course can be one of the offenses subject to reduction."

After the prosecutor advised the trial court that the stolen property alleged in count 24 was the proceeds of a bank robbery in the amount of $30,989, the court denied the petition for resentencing, ruling: "I will deny the petition because the value of the property in the possession of the defendant did exceed the $950 limit."

III. DISCUSSION

Defendant filed a timely notice of appeal from the trial court's April 27, 2015 order. We will begin our evaluation of defendant's contentions of trial court error with a brief summary of the pertinent provisions of Proposition 47.

A. *Proposition 47*

On November 4, 2014, the voters enacted Proposition 47, which reclassified certain felony drug and theft related offenses as misdemeanors and enacted a new statutory provision, section 1170.18, whereby a person serving a felony sentence for the reclassified offenses may petition for a recall of his or her sentence. (§ 1170.18, subd. (a).)

Section 1170.18 applies to "[a] person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense." (*Id.*, subd. (a).) Under section 1170.18, subdivision (a), such a person "may petition for a recall of sentence before the trial court that entered the

judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act." Section 1170.18, subdivision (b) specifies the procedure for a trial court to follow "[u]pon receiving a petition under subdivision (a)."

The theft related offenses enumerated in section 1170.18, subdivisions (a) and (b) that may be reclassified and resentenced as misdemeanors under Proposition 47 include shoplifting with a value of $950 or less [§ 459.5, subd (a)]; forgery of a document with a value of $950 or less [§ 473, subd (b)]; issuing a check for $950 or less without sufficient funds [§ 476a, subd. (b)]; petty theft with a value of $950 or less [§ 490.2, subd. (a)]; receiving stolen property with a value of $950 or less [§ 496, subd.(a)]; and petty theft with a prior theft conviction [§ 666, subd. (a)]. The offense of buying or receiving a stolen motor vehicle (§ 496d) is not one of the theft related offenses listed in section 1170.18, subdivisions (a) and (b).

B. *Exclusion of Section 496d*

On appeal, defendant contends that the trial court erred in denying his petition for resentencing under Proposition 47 because section 1170.18 should be construed to apply to a felony conviction for violating section 496d where the value of the stolen motor vehicle was $950 or less.

Defendant acknowledges that Proposition 47 did not amend section 496d to provide that the offense of buying or receiving a stolen motor vehicle with a value of $950 or less is a misdemeanor. Despite this omission, defendant maintains that it is clear that the voters intended that all theft related offenses be treated as misdemeanors where the value of the property is less than $950. Defendant explains that section 496d is a "narrower version" of the misdemeanor offense of of receiving stolen property with a value of $950 (§ 496, subd (a)), which is expressly eligible for resentencing under section 1170.18, subdivisions (a). Further, defendant asserts that construing

section 1170.18 to apply to the offense of buying or receiving a stolen motor vehicle with a value of $950 or less would serve the purpose of Proposition 47 "to channel incarceration spending to serious crime, to maximize alternatives to incarceration for nonserious crime, and to invest the savings in children's and adult programs."

The People argue that defendant's statutory analysis is incorrect because the plain language of Proposition 47 and section 1170.18 does not include section 496d. In addition, the People assert that the voters did not intend to amend section 496d to bring the offense of buying or receiving a stolen motor vehicle with a value of $950 or less within the scope of section 1170.18 because "[h]ad the voters intended to include or amend more statutes, they would have done so." Alternatively, the People contend that even assuming that the offense of buying or receiving a stolen motor vehicle with a value of $950 or less is eligible for resentencing under section 1170.18, defendant failed to meet his burden to show that the value of the stolen trailer was $950 or less.

We will resolve the issue by applying the rules of statutory interpretation, which are applicable to voter initiatives like Proposition 47. "When we interpret an initiative, we apply the same principles governing statutory construction. We first consider the initiative's language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole. If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language. If the language is ambiguous, courts may consider ballot summaries and arguments in determining the voters' intent and understanding of a ballot measure. [Citation.]" (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571 (*Pearson*).)

Thus, " ' "[w]hen statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it." [Citation.]' [Citation.]" (*People v. Hendrix* (1997) 16 Cal.4th 508, 512.) We also consider the maxim *expressio unius est*

exclusio alterius: "The expression of some things in a statute necessarily means the exclusion of other things not expressed." (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852.) Under that maxim, where the Legislature expressly includes certain criminal offenses in a statute, the legislative intent was to exclude offenses that were not mentioned. (*People v. Sanchez* (1997) 52 Cal.App.4th 997, 1001 (*Sanchez*); *People v. Walker* (2000) 85 Cal.App.4th 969, 973 [same]; *People v. Brun* (1989) 212 Cal.App.3d 951, 954 [same].)

Since section 1170.18, subdivisions (a) and (b) expressly includes certain theft related offenses (§§ 459.5, 473, 476a, 490.2, 496, & 666), we determine that the intent of the voters was to exclude theft related offenses not mentioned in the statute from reclassification and resentencing under Proposition 47. (See, e.g., *Sanchez*, *supra*, 52 Cal.App.4th at p. 1001.) The offense of buying or receiving a stolen motor vehicle is set forth in section 496d, which is a statute not included in section 1170.18, subdivisions (a) and (b). Therefore, under the maxim *expressio unius est exclusio alterius*, a conviction of violating section 496d is excluded from reclassification and resentencing under Proposition 47.

Moreover, to construe section 1170.18 as including section 496d would be inconsistent with our Supreme Court's instructions. We may not "add to the statute or rewrite it to conform to some assumed intent not apparent from that language." (*Pearson*, *supra*, 48 Cal.4th at p. 571.) And " '[w]henever possible, significance must be given to every word [in a statute] in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage.' [Citation.]" (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1131.)

We therefore conclude that the trial court did not err in denying defendant's petition for resentencing because section 496d is not included in section 1170.18. The rule of lenity argued by defendant does not convince us to alter our conclusion. Under the rule of lenity, "courts must resolve doubts as to the meaning of a statute in a criminal defendant's favor." (*People v. Avery* (2002) 27 Cal.4th 49, 57.) However, " '[t]he rule

[of lenity] applies only if the court can do no more than guess what the legislative body intended; there must be an egregious ambiguity and uncertainty to justify invoking the rule.' [Citation.]" (*Id.* at p. 58.) We have found no ambiguity in the language of section 1170.18, subdivisions (a) and (b) with respect to the theft related offenses that are eligible for reclassification and resentencing; therefore, the rule of lenity does not apply.

C. *Equal Protection*

Defendant also contends that denying a petition for resentencing of a section 496d conviction of buying or receiving a stolen motor vehicle with a value of $950 or less violates the constitutional right to equal protection. According to defendant, a person who is guilty of the offense of receiving a stolen vehicle (§ 496d) with a value of $950 or less is similarly situated to a person who is guilty of one of the theft related offenses where the value of the property was $950 or less that is eligible for resentencing under section 1170.18.

Defendant correctly asserts that the federal equal protection clause (U.S. Const., 14th Amend.) and the California equal protection clause (Cal. Const., art. I, § 7) provide that all persons similarly situated should be treated alike. However, California Supreme Court authority precludes a finding of an equal protection violation in this case. "A defendant . . . 'does not have a fundamental interest in a specific term of imprisonment or in the designation a particular crime receives.' [Citations.]" (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838 (*Wilkinson*).) Therefore, the rational basis test is applicable to an equal protection challenge involving " 'an alleged sentencing disparity.' " (*Ibid.*) Our Supreme Court also applied the rational basis test to an alleged statutory disparity: "Where, as here, a disputed statutory disparity implicates no suspect class or fundamental right, 'equal protection of the law is denied only where there is no "rational relationship between the disparity of treatment and some legitimate governmental purpose." ' [Citations.]" (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881 (*Johnson*).)

The *Johnson* court applied the rational basis test as follows: " 'This standard of rationality does not depend upon whether lawmakers ever actually articulated the purpose they sought to achieve. Nor must the underlying rationale be empirically substantiated. [Citation.] While the realities of the subject matter cannot be completely ignored [citation], a court may engage in " 'rational speculation' " as to the justifications for the legislative choice [citation]. It is immaterial for rational basis review "whether or not" any such speculation has "a foundation in the record." ' [Citation.]" (*Johnson, supra*, 60 Cal.4th at p. 881.) Therefore, "[t]o mount a successful rational basis challenge, a party must ' "negative every conceivable basis" ' that might support the disputed statutory disparity. [Citations.] If a plausible basis exists for the disparity, courts may not second-guess its ' "wisdom, fairness, or logic." ' [Citations.]" (*Ibid.*)

We find that there are several plausible reasons for the alleged disparity in excluding a conviction under section 496d from reclassification and resentencing under section 1170.18 where the value of the stolen motor vehicle was $950 or less. One reason is that the offense of buying or receiving a stolen motor vehicle may have greater consequences for the victims than other theft related offenses. The owners of motor vehicles are often dependent on their vehicles for transportation to work and school, and for obtaining the necessities of life, more so than other forms of stolen property.

Another reason is that stolen vehicles may be sold for parts in "chop shops," which may increase their worth. Targeting that type of criminal enterprise was in part the Legislature's intent in enacting section 496d, as indicated in the legislative history. The bill's author proposed that section 496d be added " 'to the Penal Code to encompass only motor vehicles related to the receiving of stolen property.' " (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2390 (1997-1998 Reg. Sess.) as amended June 23, 1998.) Section 496d was described as " 'provid[ing] additional tools to law enforcement for utilization in combating vehicle theft and prosecuting vehicle thieves. Incarcerating vehicle thieves provides safer streets and saves

Californians millions of dollars. These proposals target persons involved in the business of vehicle theft and would identify persons having prior felony convictions for the receiving of stolen vehicles for enhanced sentences.' " (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2390 (1997-1998 Reg. Sess.) as amended June 23, 1998.)

We agree with the People that a third plausible reason for the alleged disparity in excluding a conviction under section 496d from section 1170.18 concerns prosecutorial discretion in charging the offense of receiving a low value stolen motor vehicle as a felony under section 496d, rather than as a misdemeanor under section 496. Our Supreme Court has ruled that "numerous factors properly may enter into a prosecutor's decision to charge under one statute and not another, such as a defendant's background and the severity of the crime, and so long as there is no showing that a defendant 'has been singled out deliberately for prosecution on the basis of some invidious criterion,' that is, ' "one that is arbitrary and thus unjustified because it bears no rational relationship to legitimate law enforcement interests[,]" ' the defendant cannot make out an equal protection violation. [Citation.]" (*Wilkinson, supra,* 33 Cal.4th at pp. 838-839.)

Accordingly, we determine that the rational basis test is satisfied because there is a plausible basis for the alleged sentencing disparity between a conviction under section 496d for buying or receiving a motor vehicle with a value of $950 or less, which is not eligible for reclassification and resentencing under section 1170.18, and the eligible theft related convictions where the property had a value of $950 or less. We therefore find no merit in defendant's equal protection claim.

Defendant's reliance on the decision in *People v. Noyan* (2014) 232 Cal.App.4th 657 (*Noyan*) for a contrary conclusion is misplaced, since that decision is distinguishable. In *Noyan*, the issue was "whether there is a rational basis for imposing a state prison sentence on someone, such as defendant, convicted of violating section 4573.5 [bringing an alcoholic beverage into a prison] but imposing a county jail sentence on someone

convicted of violating section 4573 [bringing a controlled substance into a prison]." (*Id.* at p. 668.) No issue regarding a petition for resentencing under section 1170.18 was raised in *Noyan.*

Finally, we decline defendant's request for a remand for further proceedings to determine the value of the stolen motor vehicle involved in his section 496d conviction. We have concluded that defendant's section 496d conviction is not eligible for reclassification and resentencing under section 1170.18 even if the actual value of the stolen motor vehicle was $950 or less.

For these reasons, we conclude the trial court did not err in denying defendant's petition for resentencing. We will therefore affirm the order.

IV. DISPOSITION

The order of April 27, 2015, is affirmed.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.

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